University of Arkansas at Little Rock Law Review

Volume 11 | Issue 3 Article 1

1988

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UNIVERSITY OF ARKANSAS AT LITTLE ROCK
LAW JOURNAL

VOLUME 11 1988-89 NUMBER 3

BARGAINING WITH BAD GUYS: IS THE GOVERNMENT BOUND TO FULFILL PROMISES MADE TO SECURE THE RELEASE OF HOSTAGES?

David McCord *

I. INTRODUCTION

CUBAN INMATES IN LOUISIANA FREE ALL 26 HOSTAGES

Oakdale, La., Nov. 29—Cuban inmates today released 26 hostages they had held for eight days in the Federal detention center here. . . .

A few minutes after the hostages walked out of the facility into the arms of their colleagues, a negotiator for the Government, four detainees and three witnesses signed a formal settlement, ending what was believed to be the second-longest prison siege in the country's history.

Under the accord, the Government agreed not to rescind parole decisions it had already made for Cuban detainees with families or sponsors in this country. The Government also agreed, as it had done before, to grant the detainees individual hearings . . . .

J.D. Williams, the chief Government negotiator, said there would be no reprisals against the 1,000 detainees. He said they

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The author thanks his research assistant, Pamela Prager and his secretary, Karla Westberg, for their invaluable assistance. The author also thanks attorney Gary Leshaw of the Atlanta Legal Aid Society, and attorney Michael C. Cornwell of the Tuscaloosa, Alabama, Public Defender's Office, for their kind assistance.

would be dispersed to 45 Federal penitentiaries around the country. The center, which was heavily damaged by fire during the takeover, is to be rebuilt, Federal officials said.

"It's an excellent agreement on our behalf," said Mr. Williams, who is the regional director of the Federal Bureau of Prisons. "We did not give away the store. It's an agreement we can all live with."[1]

HOSTAGE INCIDENT AT SCHOOL ENDED
Police Overpower a Gunman Who Held Children and Teachers in Alabama

Tuscaloosa, Ala., Feb 2 (AP) — A gunman who said he wanted to help the homeless held dozens of children and teachers hostage today before the authorities fooled him into giving up his guns and then wrestled him to the ground, the officials said.

Twenty-six children and one teacher were freed unharmed when the siege at the West End Christian School ended after almost 12 hours. Nearly 60 other hostages, including three other teachers and an aide, had been released earlier in the day.

Police Chief Jerry Fuller identified the gunman as James L. Harvey, 43 years old, a Tuscaloosa native who had been living in San Antonio, Tex.

"Please Don't Hurt Me!"

Law-enforcement officers grabbed the gunman as he stepped out of the school building after being led to believe he would receive a pardon and be allowed to hold a news conference. "Please don't hurt me!" Mr. Harvey was heard to yell. "I've done everything you asked."

As they put him in a squad car, the police officers told him he would not be hurt.

While holding the hostages, Mr. Harvey said he was trying to draw attention to the nation's homeless and hungry.

Al DuPont, the Mayor of Tuscaloosa, said Mr. Harvey was shown a videotape made by Gov. Guy Hunt. Then, as part of an agreement, Mr. Harvey turned over his weapons and began to lead the child hostages outside for what he believed would be a news conference. When he walked out the door, the police slammed it shut behind him and wrestled him down. The last hostages left the building a short time later.

Mr. Harvey had been armed with two pistols and a rifle, the authorities said.

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1. N.Y. Times, Nov. 30, 1987, at A1, col. 1, and B10, col. 1.

Governor Made Promises

Governor Hunt issued a statement saying that in the videotape he had promised Mr. Harvey that he would be granted a pardon and immunity, as Mr. Harvey had demanded. But the Governor said the promise carried no legal weight.

"I'm just glad we were able to resolve it and none of those children were hurt," Governor Hunt said in Montgomery, the state capital.[2]

These two news items raise a fascinating but seldom examined question of criminal law: when the government bargains with hostage-takers, and makes promises of leniency in order to secure the safety of the hostages, is the government bound to fulfill those promises, or can the government, as Governor Hunt believes, disavow the promises? The purpose of this Article is to examine that question through an analysis of existing case law and public policy.

II. CASE LAW

The case law on this subject is sparse, consisting of four federal cases, two of which are companion cases arising out of the same incident, and three state cases. The paucity of case law can probably be explained in two ways. First, perhaps it does not often occur that the government needs to make promises to secure the release of hostages. Second, when the government does enter into such an agreement, there is a substantial practical impetus for the government to comply with the agreement in order to retain its bargaining credibility for similar situations that may arise in the future. Whatever the explanation, the case law in this country consists of only seven cases, which will now be examined in chronological order.

The first two cases, *United States v. Gorham*[3] and *United States v. Bridgeman*,[4] arose out of an attempted jail break from the District of Columbia jail in 1972. Prisoners Frank Gorham, James Bridgeman and Robert Jones succeeded in having a loaded revolver smuggled to

2. N.Y. Times, Feb. 3, 1988, at A13, col. 1. Harvey was indeed prosecuted in a state criminal action. He filed an action in Alabama federal district court to obtain an injunction against the state prosecution. The federal district judge granted the state's motion to dismiss Harvey's federal complaint on the bases that the Governor had no authority to grant immunity or a pardon, and that Harvey did not give valid consideration in that he was under a pre-existing legal duty to release the hostages. Harvey v. Alabama, No. CV-88-P-0487W (N.D. Ala. Apr. 1, 1988) (ruling from the bench). The authority question will be addressed in this Article, *see infra* text accompanying notes 55-78, as will the pre-existing duty question, *see infra* text accompanying notes 89-102.

3. 523 F.2d 1088 (D.C. Cir. 1975).

4. 523 F.2d 1099 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 961 (1976).

them. Jones then feigned an illness in his cell, and when two officers entered to assist him, Jones and Gorham overpowered them and took them hostage. The inmates then freed other prisoners in the jail and along the way acquired five more jail personnel as hostages. Several of the other freed inmates joined in the jailbreak attempt. The inmates requested to speak personally with District of Columbia Corrections Director Kenneth Hardy. When Mr. Hardy entered the jail, he was immediately seized as an additional hostage. Hardy, along with the other hostages, was beaten and threatened over the course of the next twelve hours. Eventually it became clear to the inmates that they would not be allowed to succeed in their escape attempt. They then turned their thoughts toward trying to get out of the predicament with the least legal repercussions to themselves. Through physical abuse and threats, they induced Corrections Director Hardy to sign a note drafted by the inmates which read as follows:

> I, Kenneth Hardy, Director of the Department of Corrections of the District of Columbia, hereby promise that there will be no reprisals of any kind, including no deadlock, nor will I bring any court action against any of the inmates involved in the action that has taken place on October 11, 1972 at the D.C. Jail. The inmates will be continued in their present location pending any court action.[5]

The inmates also took Hardy to the United States Courthouse and obtained an order signed by a federal district judge stating that the government would take no action against the inmates.

The inmates eventually surrendered. Numerous charges were brought against them, and the trial judge severed the cases so that three separate trials were held.[6] In appeals from two of the trials, defendants who were convicted argued that the note signed by Corrections Director Hardy and the order signed by the district judge granted them immunity from prosecution. The District of Columbia Circuit Court of Appeals decided those two appeals on the same day in the companion cases of *United States v. Gorham*[7] and *United States v. Bridgeman*.[8] Since the rationales of the two cases are identical, they will be discussed together.

The defendants' argument was simple: we had a contract for non-prosecution with the government, which the government

5. *Gorham*, 523 F.2d at 1094.
6. *Bridgeman*, 523 F.2d at 1106.
7. 523 F.2d 1088 (D.C. Cir. 1975).
8. 523 F.2d 1099 (D.C. Cir. 1975).

breached by prosecuting us.[9] As authority for this contractual mode of analysis, the defendants cited *Santobello v. New York*,[10] which had held, using contractual language, that a plea-bargaining defendant had a due process right to have the government live up to its side of the bargain.[11] Indeed, this contractual/due process argument based on *Santobello* is the argument put forth by the defendants in the five later cases as well.[12]

The court disagreed with the defendants' contention that the note and/or the order granted them immunity from prosecution. The court found five reasons why the defendants were wrong. First, the note by its own terms promised only that no administrative reprisals would be taken and that Hardy would not personally institute any lawsuits against the inmates, not that the government would not prosecute the inmates.[13] Second, even had Hardy attempted to grant immunity, such an attempt would have been unavailing since the power to grant immunity does not exist in the absence of a statute conferring it, and there was no statute granting that authority to either Corrections Director Hardy or a district judge in such circumstances.[14] Third, the alleged agreement was contrary to public policy and *nudum pactum*.[15] The court did not specify in what way such an agreement was contrary to public policy. Fourth, the alleged agreement was procured by duress and thus was voidable and had been voided by the government.[16] And fifth, even if the alleged agreement had not been void as contrary to public policy and voidable as procured by duress, there was no consideration passing from the inmates because they were under a pre-existing duty to obey the law, and performance of a pre-existing duty does not constitute valid consideration.[17]

The next pertinent case, *State v. Rollins*,[18] also involved hostage-taking by inmates. There, inmates in a Rhode Island correctional facility took a correctional officer as hostage and made a list of nine

9. *Bridgeman*, 523 F.2d at 1109-10.

10. 404 U.S. 257 (1971).

11. *Id.* at 262.

12. *See infra* text accompanying notes 18-54.

13. *Bridgeman*, 523 F.2d at 1110.

14. *Gorham*, 523 F.2d at 1096-97; *Bridgeman*, 523 F.2d at 1110.

15. *Gorham*, 523 F.2d at 1097; *Bridgeman*, 523 F.2d at 1000. *Nudum pactum* is Latin for a naked pact or bare agreement, *i.e.*, a promise made without consideration. BLACK'S LAW DICTIONARY 961 (5th ed. 1979).

16. *Gorham*, 523 F.2d at 1097; *Bridgeman*, 523 F.2d at 1110.

17. *Gorham*, 523 F.2d at 1097; *Bridgeman*, 523 F.2d at 1110.

18. 116 R.I. 528, 539 A.2d 315 (1976).

demands to the Director of the Department of Corrections. One of the demands was that they not be prosecuted for their actions in taking the guard hostage. The Director of the Department of Corrections agreed to this demand along with six others, after which the inmates surrendered.[19] The inmates were prosecuted despite the promise and were convicted. They contended on appeal that the promise of immunity estopped the state from prosecuting them. The court rejected this contention, citing three reasons. First, "[p]romises extorted through violence and coercion are no promises at all; they are void from the beginning and unenforceable as a matter of public policy."[20] Second, only the State Attorney General, not the Director of the Department of Corrections, had authority to grant immunity.[21] And third, combining the pre-existing legal duty and duress rationales, the court stated that "[w]e are dealing with coerced promises to induce defendants to do what they were already legally required to do."[22]

The next case, reported in 1979, again involved an inmate hostage-taking situation. In *United States v. West*[23] inmates took two prison guards hostage and demanded a car to effect their escape. Eventually realizing that they would not be allowed to escape, the inmates began bargaining for amnesty. The associate warden agreed to amnesty and safe conduct for all inmates involved if the inmates freed the hostages unharmed. Finally the inmates freed the hostages unharmed.[24] The state then prosecuted the inmates for the insurrection. After referring to the conclusions of *Gorham* and *Bridgeman* that such an agreement was voidable because of duress and a *nudum pactum* contrary to public policy,[25] the court held that the associate warden's agreement was unenforceable because it was induced by duress.[26]

The 1983 case of *United States v. McBride*[27] is the first reported case involving a situation other than a prison insurrection, and the only case of those to be discussed involving property being taken "hostage." *McBride* involved an extortion attempt. In that case five persons, including John McBride and his wife Jill Bird, planted five

19. *Id.* at 531-32, 359 A.2d at 317.
20. *Id.* at 533, 359 A.2d at 318.
21. *Id.*
22. *Id.*
23. 607 F.2d 300 (9th Cir. 1979).
24. *Id.* at 303.
25. *Id.*
26. *Id.* at 304.
27. 571 F. Supp. 596 (S.D. Tex. 1983).

bombs at the Gulf Chemical Company's Cedar Bayou Plant in Texas and then sent a letter to Gulf demanding $15 million in return for information concerning the locations and deactivation sequences for the bombs. The letter also stated that the conspirators had planted bombs at another Gulf Chemical facility, and that if Gulf did not comply with the $15 million demand for Cedar Bayou, the conspirators would demand $30 million for information concerning the locations and deactivation sequences of the bombs at the second, unidentified facility. (Although bombs were in fact placed at the Cedar Bayou plant, the conspirators decided that it was not necessary to plant bombs at another location and that the mere threat of having done so would be sufficient.)[28] Within a day of Gulf's receipt of the letter, Gulf and the authorities had located and disarmed the five bombs. However, the authorities were still concerned about the safety of the facility in view of the fact that the extortion note said that in excess of ten explosive charges had been planted at Cedar Bayou, and more devices at the other, undisclosed facility.[29]

Within a week the authorities had captured all five of the conspirators. Upon his arrest, McBride offered to give the government "everything it needed" in exchange for immunity for Bird.[30] Believing that bombs might still be present on the premises and that they might yet explode since the extortion note had stated that the bombs could explode for some period after they had been planted, both the United States Attorney's Offices in Colorado, where McBride and Bird were arrested, and in the district in Texas where the bombs were planted, agreed to the terms.[31] McBride cooperated to the satisfaction of the United States Attorney's Office in Colorado and the FBI, and the United States Attorney's Office in Colorado dismissed the complaint against Bird.[32] The United States Attorney's Office in Texas, however, decided to prosecute Bird. Bird moved to dismiss the indictment on the ground that it violated the government's agreement with McBride not to prosecute her.

The district court first considered the government's argument that the alleged agreement was void due to the lack of consideration in that McBride was merely fulfilling the pre-existing duty to refrain from criminal activity in promising to locate and describe the explosives. The court rejected the government's position, finding that Mc-

28. *Id.* at 600.
29. *Id.* at 599.
30. *Id.* at 601.
31. *Id.* at 602-03.
32. *Id.* at 604.

Bride did do something that he had no pre-existing legal duty to do, that is, he relinquished his rights under the fifth amendment and provided the government with incriminating evidence.[33] Next, the court examined the government's argument that enforcing the alleged agreement would be contrary to public policy. Unlike previous courts, which had not attempted to identify the public policy that would be contravened, the court in *McBride* identified three public policies that might be implicated.[34] First was the encouragement of the disclosure of criminal activity.[35] As to this public policy, the court found that the agreement in the case before it did not contravene that policy; indeed it was entered into precisely in order to obtain information about the criminal activity.[36] The court identified two other public policies that could conceivably be implicated, namely, the interest of the public that the government not be blackmailed,[37] and the interest in not enforcing coerced adhesion contracts.[38] However, on the facts of the case before it the court found, for reasons which it did not clearly articulate, that those public policies were not violated.[39]

The court then considered the government's duress argument.[40] The court found a distinction between the facts here and the facts in the prison uprising cases. In the prison uprising cases the purpose of the threat to the hostages was to secure the immunity agreement. In the case before it the threat to explode the bombs was not made in an attempt to gain immunity, but rather to extort millions of dollars. The court viewed McBride as being in a marginally better position than the prison hostage-takers, because he did not threaten the government with the occurence of bad consequences that would not otherwise occur if the government refused to accept his bargain.[41] Nonetheless, the court held that the continued existence of the threat to the public safety engendered by the original threat was sufficient to constitute duress on the government agents.[42] The court then went on to hold, however, that the United States Attorney's Office in Colo-

33. *Id.* at 605-06. The government made some other contract arguments based on the peculiar facts of the case that do not warrant discussion.

34. *Id.* at 608.

35. *Id.*

36. *Id.*

37. *Id.* at 608, n.8.

38. *Id.*

39. *Id.*

40. *Id.* at 610.

41. *Id.* at 611.

42. *Id.* at 612.

rado, by dismissing the complaint against Bird, had ratified the otherwise unenforceable agreement.[43]

That was not the end of the matter. The court found that contract principles did not automatically control in a criminal case.[44] Rather, the court held that the application of the contract principles to government agreements in criminal cases derives from the court's supervisory responsibility for the administration of criminal justice, and that those principles should not automatically be applied, but rather should be applied only after giving due weight to countervailing public policy considerations.[45] On the facts of the case the court found that public policy reasons against upholding the alleged agreement far outweighed the interest of the defendant in having contract principles applied:

> [The Assistant United States Attorney's] action was obviously not the calm exercise of discretion. The agreement, unlike agreements in other cases, was entered under duress and consequently voidable, and the court's concern therefore, is not, with protection of defendant in the face of an overpowering government or with government misconduct but, to the contrary, for the public safety and protection of a government of laws in the face of violence.[46]

Accordingly the court denied the motion by Bird to dismiss the indictment against her.[47]

The 1985 case of *State v. Sands*[48] again involved a hostage-taking, but not in a prison context. In that case, when police officers sought to arrest Sands for assaulting his wife, he barricaded himself into his house and took his four children hostage. Eventually the county sheriff signed a document granting "immunity" to Sands for all activities which had transpired up to that time. Sands finally surrendered and was promptly prosecuted.[49] After being convicted, Sands argued on appeal that the prosecution was improper because the sheriff had granted him immunity. The court summarily disagreed on the basis that a contract induced by duress is unenforceable.[50]

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43. *Id.* at 613.

44. *Id.* at 614 (citing Acosta v. Turner, 666 F.2d 949, 953 (5th Cir. 1982), and United States v. Lieber, 473 F. Supp. 884, 891 (E.D.N.Y. 1979)).

45. *Id.*

46. *Id.* at 618.

47. *Id.*

48. 145 Ariz. 269, 700 P.2d at 1372.

49. *Id.* at 272, 700 P.2d at 1372.

50. *Id.* at 275, 700 P.2d at 1375.

The final case, *Wagner v. State*,[51] decided in 1985, returns to the context of hostage-taking by prison inmates. In that case, during negotiations to end a prison riot, the warden communicated a promise of no reprisals against certain inmates, including Wagner, for the riot situation. The promise specifically included that correction officials would not bring any administrative or disciplinary proceedings or sanctions against Wagner.[52] After authorities quelled the riot, correction officials subjected Wagner to administrative proceedings and sanctions as a result of his conduct. The most drastic consequence to Wagner was forfeiture of 1,283 days of good time earned by him prior to the riot.[53] Wagner brought an application for post-conviction relief challenging the forfeiture of his good time. One of his arguments was that the agreement made by the warden was binding on the state. The court concluded that any such agreement was contary to public policy and void. The court said that while the executive department could live up to the bargain for such reasons as it found valid, when it did not do so the court would not uphold such an alleged agreement.[54]

III. Analysis and Discussion

A. The Question of Authority

Before examining whether agreements like those in the previous cases should be enforced under contract and public policy principles, a preliminary question that arose in about half of those cases needs to be examined; namely, what if the defendant seeking to uphold a grant of immunity received that grant from someone who was not authorized by law to give it? The issue arose in *Gorham*[55] and *Bridgeman*[56] where the court held that under federal law immunity could be granted only by a federal district court and only to a prospective witness, and thus the immunity granted by the Corrections Director and the district judge was without authority and unenforceable.[57] Likewise, in *Rollins*[58] the court held that under Rhode Island law only the Attorney General could grant immunity, and thus the purported grant of immunity by the Director of the Department of Corrections

51. 364 N.W.2d 246 (Iowa 1985).
52. *Id.* at 248.
53. *Id.*
54. *Id.* at 250-51.
55. 523 F.2d 1088 (D.C. Cir. 1975).
56. 523 F.2d 1099 (D.C. Cir. 1975).
57. *Gorham*, 523 F.2d at 1096-97; *Bridgeman*, 523 F.2d at 1110.
58. 116 R.I. 528, 359 A.2d 315 (1976).

was unenforceable.[59]

These holdings provide an easy resolution of such cases, but the defense is not without a further line of argument. Under the law of at least one federal circuit (the Eleventh),[60] and at least one state,[61] there exists the doctrine of "equitable immunity," the purpose of which is to allow courts to enforce immunity agreements even where those agreements were flawed because not entered into by the proper governmental authority. The most prominent decision to embrace the doctrine is *Rowe v. Griffin*,[62] decided by the Court of Appeals for the Eleventh Circuit in 1982. There, Rowe, a paid FBI informant who had infiltrated the Ku Klux Klan, witnessed a murder committed by Klansmen during the Selma to Montgomery civil rights march in 1965. Rowe reported the crime immediately to the FBI and aided the FBI in its investigation. After being assured of immunity from prosecution by the Attorney General of Alabama, Rowe testified against the Klansmen, who were convicted.[63] Thirteen years later a state district attorney in Alabama, upon learning the results of lie detector tests of the two surviving convicted Klansmen, purportedly showing that they were truthful when they stated that Rowe had committed the murder, obtained a state indictment for murder against Rowe.[64] Rowe instituted an action in federal district court to secure an injunction against the state criminal proceeding. His major legal problem was that, at the time of his agreement with the Alabama Attorney General, no statute existed empowering the Attorney General to grant immunity.[65] Under the doctrine that a federal court can enjoin a state prosecution taken in bad faith or for the purpose of harassment,[66] the federal district court held that the promise to Rowe had to be fulfilled.[67] The court embraced the doctrine of "equitable immunity" which had been mentioned, but not used, in some earlier cases.[68] While recognizing that "the concept of equitable immunity is not well defined,"[69] the Eleventh Circuit on appeal also embraced the doctrine,

59. *Id.* at 533, 359 A.2d at 318.
60. Rowe v. Griffin, 676 F.2d 524 (11th Cir. 1982).
61. People v. Brunner, 32 Cal. App. 3d 908, 915, 108 Cal. Rptr. 501, 506 (1973).
62. 676 F.2d 524 (11th Cir. 1982).
63. *Id.* at 525.
64. *Id.*
65. *Id.* at 526.
66. Younger v. Harris, 401 U.S. 37, 49-54 (1971).
67. 497 F. Supp. 610, 616 (M.D. Ala. 1980).
68. *E.g.*, United States v. Beasley, 550 F.2d 261, 268 (5th Cir.), *cert. denied*, 434 U.S. 938 (1977); United States v. Donahey, 529 F.2d 831, 832 (5th Cir.), *cert. denied*, 429 U.S. 828 (1976); United States v. Mitchell, 384 F. Supp. 562, 563 (D.D.C. 1974).
69. 676 F.2d at 526 n.3.

holding that immunity should be available under the equitable powers of courts when three conditions are met: first, that an agreement was made; second, that the defendant had performed his side; and third, that the subsequent prosecution was directly related to offenses in which the defendant, pursuant to the agreement, either assisted with the investigation or testified for the government.[70] The court went on to provide a constitutional underpinning to its holding, analogizing to *Santobello*,[71] which had held that a defendant has a due process right to enforcement of a plea agreement.[72] The court held that this contractual analysis applied equally well to promises of immunity from prosecution.[73] The court found that Rowe was entitled to complete immunity from prosecution and permanently enjoined the state proceeding.[74]

The defendants in *Gorham*,[75] *Bridgeman*,[76] and *Rollins*[77] did not argue the equitable immunity doctrine, undoubtedly because the doctrine had not yet been formulated in the mid-1970s when those cases were decided. Would a court today, in a jurisdiction that accepts the equitable immunity doctrine, apply it in a hostage-taking situation to help a defendant avoid having the agreement invalidated because he negotiated with the improper governmental authority? Although there is no case law on the proposition, it seems likely that a court would not elect to bail a defendant out of the authority problem by utilizing the doctrine of equitable immunity. The concept of "equity" is founded upon the concept of fairness, and it does not seem likely that a court would ignore the unfairness of the defendant holding hostages while negotiating the purported agreement. If ever a party in court exhibited the proverbial "unclean hands," it would be such a hostage-taker.

Apparently, then, a hostage-taker who wishes to conclude an agreement of non-prosecution must take pains to make sure that the agreement is concluded with the proper governmental authority. Usually, of course, this rather arcane legal requirement will not be known or intuitively obvious to the hostage-taker. Accordingly, the chances of the hostage-taker obtaining approval from the proper au-

70. *Id.* at 527-28.
71. 404 U.S. 257 (1971).
72. *Id.* at 262.
73. 676 F.2d at 528.
74. *Id.* at 529. In fact, the Eleventh Circuit granted Rowe transactional immunity, whereas the district court had granted him only use immunity, 497 F. Supp. at 615-17.
75. 523 F.2d 1088 (D.C. Cir. 1975).
76. 523 F.2d 1099 (D. C. Cir. 1975).
77. 116 R.I. 528, 359 A.2d 315 (1976).

thority are slim. In fact, it may be that in some jurisdictions there is simply no authority available for granting immunity in those circumstances. For example, a hostage-taker negotiating with the federal government probably cannot obtain immunity from *any* governmental official, since immunity is available pursuant to a statute which permits only immunization of prospective witnesses, and only by a federal district court.[78]

B. The Defense Contractual Argument: *Santobello*

The argument offered by the defense in all of these cases is a contractual one premised upon *Santobello v. New York*.[79] In *Santobello* the prosecutor in a plea agreement agreed to make no recommendation as to sentence. At Santobello's appearance for sentencing many months later a new prosecutor recommended the maximum sentence, which the court imposed. Santobello attempted unsuccessfully to withdraw his guilty plea. His conviction was affirmed by the court of appeals. But the United States Supreme Court held that Santobello was entitled to have the government comply with the terms of the plea agreement it had entered into with him:

> This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.[80]

Although the Supreme Court did not mention the word "contract," it did use words like "promise," "agreement," and "consideration" that are part of the contractual lexicon. Thus, *Santobello* stands for the proposition that an agreement between the government and an accused should, at least to some extent, be governed by contract principles.

The obvious way in which a hostage-taker who has secured an agreement from the government in return for release of hostages seeks to use *Santobello* is to argue that the hostage-taker had a contract with the government with which the government is bound to comply. Unfortunately for such defendants, having opted into the arena of contract law, there are two doctrines of contract law that serve to

78. 18 U.S.C. §§ 6001-05 (1982).
79. 404 U.S. 257 (1971).
80. *Id.* at 262.

readily render such alleged contracts unenforceable. Prosecutors have been quick to point out these doctrines to courts, and courts have been eager to accept them. These two doctrines will now be discussed.

C. The Prosecution's Contractual Responses

1. Duress

The most obvious contract doctrine which serves to render such alleged contracts unenforceable is duress. "Duress" is defined in contract law as "any wrongful act or threat which overcomes the free will of a party."[81] In determining whether a transaction may be avoided for duress "the main inquiry is to ascertain what acts or threats are branded as wrongful."[82] And while there are some hazy areas concerning what constitutes duress, it is crystal clear that "[v]iolence and threats of violence are wrongful."[83] Thus, the threats of violence to person or property, or of continuing to hold a person against that person's will, involved in the seven reported cases undoubtedly constitute duress. The contrast between the *Santobello* fact pattern and the fact patterns in the hostage-taking cases is vivid and easily perceived. As the *Bridgeman* court pointed out, *Santobello* involved "mutually binding promises freely given in exchange for valid consideration,"[84] while a bargain secured while holding hostages involves "the most patent form of duress."[85]

An interesting feature of the duress doctrine, however, is that it does not render the alleged agreement completely *void*, but simply *voidable* at the election of the coerced party.[86] The significance of this distinction is that a contract which is merely voidable can be ratified by the coerced party after the coercion is removed.[87] The question of ratification will be discussed in a later section of this article.[88]

2. Failure of Consideration/Pre-existing Duty

The second contract doctrine which operates to the detriment of hostage-takers is the pre-existing duty rule. That rule states that "[w]here a party does or promises to do what he is legally obligated to

81. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 9-2, at 337 (3d ed. 1987).
82. *Id.* § 9-2, at 338.
83. *Id.* § 9-3, at 339.
84. 523 F.2d 1099, 1110 (1975).
85. *Id.*
86. J. CALAMARI & J. PERILLO, *supra* note 81, § 9-8, at 349.
87. *Id.*
88. *See infra* text accompanying notes 103-14.

do or promises to refrain from doing or refrains from [sic] doing what he is not legally privileged to do he has not incurred detriment."[89] Refraining from harming hostages or promising to release hostages from unwarranted restriction of their personal liberty clearly falls within the ambit of the pre-existing duty rule. As Corbin states in his treatise, "[f]orbearance to commit a tort or a crime is something that is required of all by public law. Such forbearance is not a sufficient consideration for a return promise."[90] In all of the cases but one that have considered the pre-existing duty argument, the court has found that what the hostage-takers promised to do was no more than what they already had a pre-existing duty to do.

The one exception is *McBride*.[91] While not disagreeing with the principle that forbearance to commit a crime does not constitute sufficient consideration, the court found that McBride had given the government more than simply a promise of forbearance from committing a crime. Additionally, he had given up his fifth amendment right not to incriminate himself when he had provided the government with information concerning the location of the bombs.[92]

The court's holding that McBride provided information that he was not required to provide, thus providing sufficient consideration to support the agreement, is questionable, at least in retrospect, given the United States Supreme Court decision a year later in *New York v. Quarles*.[93] In that case the Supreme Court held that there exists a "public safety" exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence.[94] In *Quarles* the police apprehended a rape suspect in a supermarket. Upon arresting the suspect an officer noticed that he was wearing an empty holster. The officer asked the suspect where the gun was hidden, and the suspect responded by telling the officer where he had left the gun. The suspect was then charged with illegally carrying a weapon, and his statement concerning the location of the gun was admitted against him, even though he had not been given *Miranda* warnings at the time the statement was made. After noting that the presence of a gun in a public area constituted a grave danger to the

89. J. CALAMARI & J. PERILLO, *supra* note 81, § 4-9, at 204.

90. 1A A. CORBIN, CORBIN ON CONTRACTS § 189, at 173 (1963). *See also* 1 S. WILLISTON, WILLISTON ON CONTRACTS § 132, at 562 (W. Jaeger 3d ed. 1957): "As everybody is under legal duty not to commit a tort, returning property to its owner, or otherwise refraining from a tort is not a sufficient consideration."

91. 571 F. Supp. 596 (S.D. Tex. 1983).

92. *Id.* at 605-06.

93. 467 U.S. 649 (1984).

94. *Id.* at 655.

public,[95] and noting that requiring the police to administer *Miranda* warnings in such a circumstance could deter the suspect from providing information leading to the alleviation of this public danger,[96] the Court stated:

> Officer Kraft needed an answer to his question not simply to make his case against Quarles but to ensure that further danger to the public did not result from the concealment of the gun in a public area.
>
> We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination.[97]

While the exact parameters of the "public safety exception" are unclear, it would seem that a situation such as in *McBride*, where there existed a possibility of serious injury to property and persons from bombs, would fall within that exception. Indeed, in a state case anticipating the ruling in *Quarles* an Indiana court held that where a suspect has been questioned before being given *Miranda* warnings concerning the presence, location, and method of detonation of a bomb planted by him, those statements were admissible as an exception in the *Miranda* rule.[98] Analogously, prior to *Quarles*, California courts had fashioned a more limited version of the "public safety exception" called the "rescue doctrine" exception.[99] That doctrine held that when the police interrogate a suspect for the paramount reason that information is being sought to save a life, the interrogating officers are justified in not impeding the rescue efforts by informing the defendant of his rights under *Miranda*, and the statements obtained are nonetheless admissible.[100] Under these holdings the statements by McBride could have been used against him even if he had made them before having been given his *Miranda* warnings.

Admittedly, holding that statements made by a suspect are admissible into evidence even though the suspect was in custody and not Mirandized is different from holding that the suspect had no right to

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95. *Id.* at 657.

96. *Id.*

97. *Id.*

98. Cronk v. State, 443 N.E.2d 882, 884-87 (Ind. App. 1983).

99. People v. Willis, 104 Cal. App. 3d 433, 163 Cal. Rptr. 718, *cert. denied*, 449 U.S. 877 (1980); People v. Riddle, 83 Cal. App. 3d 563, 148 Cal. Rptr. 170, *cert. denied*, 440 U.S. 937 (1978); People v. Modesto, 62 Cal. 2d 436, 42 Cal. Rptr. 417, 398 P.2d 753, *cert. denied*, 389 U.S. 1009 (1965), overruled on other grounds in People v. Sedeno, 10 Cal. 3d 703, 112 Cal. Rptr. 1, 518 P.2d 913 (1974); People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974).

100. People v. Dean, 39 Cal. App. 3d 875, 114 Cal. Rptr. 555 (1974).

withhold that information from investigating authorities if he had elected to do so. Nonetheless, the holding of the "public safety exception" is that in certain exigent circumstances created by the suspect, the suspect's fifth amendment right not to incriminate himself is not entitled to *full* constitutional protection. Put differently, the suspect's fifth amendment right is not "worth" as *much* in those circumstances. But is it "worth" *something*? If so, giving it up could constitute consideration for a contract; if not, it could not constitute consideration.

A commentator discussing the California "rescue doctrine" suggests that a suspect does not have a right to withhold potentially life-saving information from the authorities at all: "The rationale behind the doctrine is that the interest in saving a human life is considered to be outside of the parameters of the constitutional protection afforded against self-incrimination."[101] This position makes eminently good sense. It does not comport with any rational vision of the value of the privilege against self-incrimination to hold that a suspect can place persons and property in jeopardy by means such as a bomb and then sit silently in police custody while the bomb ticks away and explodes. The suspect in such circumstances should be under a duty to disclose the whereabouts of the bomb. If the suspect is under such a duty, then by divulging the location of the bomb the suspect is not giving up anything in addition to what is required by law to be given up. And if the suspect is giving up nothing, then it is incorrect for a court to hold, as did the *McBride* court, that giving up that information constitutes sufficient consideration to support a contract.[102]

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101. Annotation, *Concern for Possible Victim (Rescue Doctrine) as Justifying Violation of Miranda Reguirements*, 9 A.L.R.4th 596 (1981).

102. Yet there are some circumstances in which a suspect's providing of information which he should be expected to provide can suffice to make an agreement that the suspect may enforce against the government. An illustrative case is Palermo v. Warden, Green Haven State Prison, 545 F.2d 286 (2d Cir. 1976). There, Palermo was in jail for a crime and was a suspect in another multi-million dollar jewel robbery. State prosecutors approached Palermo and began negotiating to try to get him to reveal the whereabouts of the jewelry. Palermo agreed to help locate the jewelry in return for a promise of parole on the sentence for which he was incarcerated. Palermo did lead the authorities to the jewelry, but the state reneged on its promise to grant the parole. Palermo filed suit to enforce the bargain in federal court. The Second Circuit upheld a trial court ruling granting Palermo's requested relief. The state argued that under the pre-existing duty rule, Palermo had no legal right to conceal and withhold the stolen property and thus had given no consideration. *Id.* at 295. The court disagreed, noting that it was the state, not Palermo, which had initiated the negotiations, and the state had never expressed any dissatisfaction with what it had received through the bargain. *Id.* The court distinguished *Gorham* as inapposite because there the bargain was "negotiated under extreme duress." *Id.*

It is questionable whether Palermo did provide any information beyond what the law required him to provide since he had a legal obligation not to withhold property from its true

In summary, with respect to pre-existing duty, in most hostage-taking situations when a hostage-taker promises to not harm victims or to release them, that promise or even performance of the promise, constitutes merely the performance of a pre-existing duty which does not constitute consideration. Even where a suspect provides information, thereby seemingly giving up the right not to incriminate himself, the "public safety exception" rationale should lead to the conclusion that the suspect had no right to withhold that information to begin with, and thus, the suspect was not giving up anything of value constituting consideration. Finally, even if the "public safety exception" does not serve to render the relinquishment of the right to self-incrimination valueless, the pre-existing duty rationale for striking down such agreements is superfluous anyway, since the duress doctrine would strike down such agreements even if consideration were found. The only possible difference between refusing to enforce the agreement on a duress basis and a pre-existing duty basis is with respect to the possibility of ratification, which will be discussed below.

D. The Question of Ratification

It is important for government representatives to recognize that the behavior of the government *after* the release of the hostages may be important due to the contract doctrine of ratification.

The doctrine of ratification is available to a person seeking to enforce a contract when the other party claims to have entered into the contract under duress.[103] It is standard contract doctrine that a contract procured through duress is merely voidable and not completely void.[104] The party who consented to the contract through coercion is deemed to ratify the transaction if after the coercion is removed he recognizes its validity by acting upon it, accepting benefits under it, or failing to act to avoid it with reasonable promptness.[105] Indeed, the government in the Cuban inmate hostage situation, outlined in the news report at the beginning of this Article,[106] has almost assuredly lost any possible duress defense by virtue of its subsequent

owner. *See supra* note 90 and accompanying text. Yet the equities of the situation clearly dictate that Palermo should prevail. Better bases for the decision would be due process of law, or the courts' supervisory power over criminal proceedings to see that justice is done. *See McBride*, 571 F. Supp. at 615, suggesting these bases for upholding seemingly flawed agreements.

103. J. CALAMARI & J. PERILLO, *supra* note 81, § 9-8, at 349.

104. *Id.*

105. *Id.*

106. *See supra* text accompanying note 1.

professions of satisfaction with the agreement and its actions taken in compliance with the agreement.

The ratification argument is apparently not so easily available to a defendant seeking to enforce a bargain in the face of the government's invocation of the pre-existing duty rule. An agreement unaccompanied by consideration passing from one of the parties usually produces no legal obligation,[107] and "[a]n agreement which produces no legal obligation is frequently called a 'void' contract."[108] If the agreement is "void" for lack of consideration, then it takes some contractual sleight of hand to say that the agreement can be ratified, unless and until some consideration does pass, thereby creating a contract susceptible of ratification.

Thus, while initially it seemingly makes no difference whether the court holds the agreement unenforceable under the duress doctrine or the pre-existing duty doctrine, it may matter if there is a question of the ratification. Indeed, in *McBride*[109] the court held that consideration had passed so that the pre-existing duty doctrine would not avail the government[110] and also held that the agreement was procured under duress.[111] It then proceeded to hold that the coerced agreement had been ratified by the government.[112]

It is important to remember, however, that the *McBride* court did not end the analysis there but rather concluded that while strict contract analysis would hold the government to the bargain, strict contract analysis was not the last word with respect to agreements in a criminal context.[113] The court then held that from a public policy standpoint the ratified coerced agreement was unenforceable.[114]

E. Beyond Contractual Analysis: The Prosecution's Public Policy Argument

Prosecutors in the cases that have been discussed almost uniformly argue that it would be contrary to public policy to enforce such agreements. Courts faced with that argument invariably accept it. Yet the "public policy" holdings of the courts are usually not well articulated. In fact, the only court to attempt to state what public

107. J. CALAMARI & J. PERILLO, *supra* note 81, § 4-1, at 186.
108. 1 S. WILLISTON, WILLISTON ON CONTRACTS § 15, at 28 (W. Jaeger 3d ed. 1957).
109. 571 F. Supp. 596 (S.D. Tex. 1983).
110. *Id.* at 605-06.
111. *Id.* at 612.
112. *Id.* at 613.
113. *Id.* at 614.
114. *Id.* at 618.

policies are implicated was the court in the *McBride* case.[115] To the credit of the district judge in that case, he put his finger squarely on the public policy that would be offended by the enforcement of such agreements: for the court to enforce such agreements would be to validate the rule of force over the rule of law. As stated by the court:

> It is clear that an individual may not, by threatening innocent citizens, extract a promise from that government and then use the courts to immunize himself or anyone else from prosecution. In the exercise of the court's supervision over the criminal justice system, "[p]ublic confidence in the fair and honorable administration of justice upon which ultimately depends the rule of law, is the transcending value at stake." [citations omitted] To enforce the agreement with McBride would effectively ratify the defendant's illegal actions rather than uphold the rule of law.[116]

It is important to note that if the agreement is void as against public policy, then ratification would not seem to be a danger to the government, since there would be no agreement in the first instance that could later be ratified.

Thus, the prosecution has not only some heavy contractual artillery in its stockpile but also some heavy public policy artillery.

F. Beyond Contractual Analysis: A Possible Defense Argument

Faced with such heavy artillery, it is not surprising that defendants have not prevailed in the cases under discussion. Yet there is one argument that has not yet been attempted by defendants that may hold some slight glimmer of hope. That argument is that the government is held to higher standards of conduct than a private litigant, and that while the duress and pre-existing duty doctrines would be available to private litigants to avoid an agreement, they are not available to the government because the government is under a higher duty to comply with agreements than are private parties. Behind this argument lies a somewhat metaphysical conception of the government as the embodiment of purity, nobility, and transcendent justice. Such a noble entity should not be allowed to resort to the defenses which mere mortals use to attempt to "wriggle out" of contracts.

There is some scant authority for this view that the government should be held to very lofty standards of conduct. Several decades ago in the context of a federal prosecutor's misbehavior in closing argument, the United States Supreme Court stated:

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115. *Id.* at 608, 616-18.
116. *Id.* at 618.

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.[117]

But while this principle is accepted with respect to a prosecutor's behavior in closing argument, and probably at the trial as a whole, only once has it been suggested (and that only by a district court) that that rationale extends to the government's decision to prosecute. In *United States v. Phillips*[118] the government sought to have Phillips, a national union officer, held in criminal contempt of a court order in the Northern District of Illinois, even though the government had assured a judge in the District of Columbia that it would not proceed against national union officers in actions against local union affiliates and officers. The judge in the Northen District of Illinois found this course of conduct to be "fundamentally unfair."[119] In so finding he stated: "In the court's view, the government must be held to a higher standard of conduct than that applicable to a private litigant, especially in the context of a criminal or quasi-criminal prosecution."[120]

While this line of reasoning provides an argument, it provides no compelling rationale forbidding the government to use the duress and pre-existing duty doctrines. Those doctrines of contract law are to a great extent based upon fairness and common sense, rationales to which the government should be able to resort as easily as any of its citizens.

And even if the argument that the government should be held to a higher standard were sufficient to prohibit the government from using contract defenses, that would not automatically mean that an agreement should be enforced. As has already been noted, the government has a public policy argument separate and apart from its contractual arguments. And pitting the defendant's "government held to a higher standard" argument against the prosecution's "rule of law rather than rule of force" argument, it seems quite clear that the government's public policy argument emerges as the victor.

IV. CONCLUSION

The contractual and public policy arguments decisively favor the

117. Berger v. United States, 295 U.S. 78, 88 (1935).
118. 527 F. Supp. 1361 (N.D. Ill. 1981).
119. *Id.* at 1363.
120. *Id.* at 1364 n.4.

government in these hostage-taking situations. Indeed, the conclusion that such agreements should not be enforceable against the government is such a visceral, common sense feeling that in a sense searching for technical legal doctrines to justify the result seems almost superfluous. Virtually any person on the street could probably give just about as good an answer to the question whether such an agreement should be enforceable as a court can: "Are you kidding?!"